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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

v.

FRANK DYSON, et al.,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Opinion of the District Court for the Northern District of Texas is set out in Plaintiff's Writ of Certiorari, Appendix 2a. The per curiam decision of the Court of Appeals for the Fifth Circuit is set forth in Plaintiff's Writ of Certiorari, Appendix 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The Petition

for Writ of Certiorari was received and docketed in the Supreme Court of the United States on July 16, 1973. Jurisdiction is alleged by the Petitioners under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED BY PETITIONERS

1. Must petitioners show bad faith, harassment or other extraordinary circumstances required by *Younger v. Harris*, 401 U.S. 37 (1971), when they seek federal declaratory relief from a facially unconstitutional ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending?

2. Under the circumstances described in Question No. 1, and when in addition the petitioners, prior to conviction, have sought a writ of prohibition of the State's highest court, and the writ has been denied, must petitioners exhaust other state remedies prior to obtaining federal declaratory relief?

STATUTORY PROVISIONS INVOLVED

Seciton 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in Petitioners' Appendix, Pages 8a through 10a.

Article 4.14 of the Texas Code of Criminal Procedure:

> The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which the punishment is by fine only,

> and where the maximum of such fine may not exceed $200.00, and arising within such corporate city limits.

Article 44.17 of the Texas Code of Criminal Procedure:

> In all appeals from justice and corporation courts to the county court, the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court.

STATEMENT OF THE CASE

The Petitioners, Tom E. Ellis and Robert D. Love, brought this action against various named officials of the City of Dallas under Title 42, United States Code, Section 1983. The Petitioners attacked Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, as amended, as being unconstitutional on its face. Tom E. Ellis and Robert D. Love did not allege that they had any pending criminal proceedings against them but seek federal declaratory and injunctive relief against possible future prosecution under the City of Dallas' Loitering Ordinance, Section 31-60 of the Dallas City Code. The Petitioners made no allegations in their complaint of bad faith prosecution by any named or unnamed City of Dallas officials. The District Court after considering the pleadings, reading the briefs, and hearing arguments of counsel, found no allegations of bad faith prosecution, harassment or other unusual circumstances which would cause the Petitioner to suffer irreparable injury and harm through the enforcement of the subject ordinance. For the above reasons and those reasons more extensively set forth in its written opinion, the District Court on December 13, 1972, granted the Defendants-Respondents' Motion for Dismissal.

STATEMENT OF FACTS

The Petitioners' Complaint in the trial court alleges that they were arrested in the City of Dallas on January 18, 1972, and charged with violating Section 31-60, Revised Code of Civil ad Criminal Ordinances of the City of Dallas (App. 3).* Petitioners applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this Ordinance. On February 21, 1972, the Texas Court of Criminal Appeals denied the Petitioners' application for writ of prohibition without written opinion (App. 6). In municipal court the Petitioners allege that they renewed their objections to the jurisdiction of that court on the ground that the ordinance which they were charged with violating was unconstitutional (App. 6). The motion was denied and the Petitioners entered pleas of nolo contendere and were convicted. The municipal court records indicate that both Petitioners paid $12.50 each ($10.00 fine plus $2.50 court cost) (App. 41).

The Petitioners never asserted in their Complaint the inadequacy of the state remedies nor did they raise this argument on appeal to the Fifth Circuit. The Petitioners are now raising for the first time in the federal courts, their argument that the Dallas County Court of Criminal Appeals would not reach their constitutional questions. The affidavits referred to on Pages 4, 5, and 13 of Petitioners' Brief were filed in the Texas Court of Criminal Appeals. The Petitioners never controverted or challenged in the federal court the Defendants-Respondents' affirmative allegation that Texas laws provide

* The designation "App." refers to the appendix filed in the United States Court of Appeals for the Fifth Circuit in this case.

an adequate remedy for any person charged with a violation of Ordinance 31-60. The affidavits referred to in Pages 4, 5, and 13 of Petitioners' Brief were never made an exhibit or part of the Petitioners' Complaint.

Although a trial de novo to the county court is sanctioned by Article 44.17, Code of Criminal Procedure, State of Texas, the Petitioners made no further effort to reurge the constitutionality of the subject ordinance in the state courts (App. 54). The Petitioners alleged that they exercised "reasonable diligence" in raising the constitutionality of this ordinance in the state court (App. 6, par. 6). However, the Plaintiffs-Petitioners never alleged that they exhausted the state appeal processes after they pled "nolo contendere" in municipal court nor did they ever obtain a trial de novo in the Dallas County Criminal Court of Appeals (App. 54).

ARGUMENT AND AUTHORITIES

I.

PETITIONERS' ACTION IS WITHIN THE CLASS OF CASES CONTROLLED BY THE SUPREME COURT DECISION, YOUNGER v. HARRIS, AND EVEN ASSUMING THE UNCONSTITUTIONALITY OF THE CITY OF DALLAS' LOITERING ORDINANCE ON ITS FACE, THE TRIAL COURT ACTED PROPERLY IN DISMISSING THE PETITIONERS' COMPLAINT SINCE THEY DID NOT ALLEGE NOR DID THEY SHOW BAD FAITH HARASSMENT, OR OTHER UNUSUAL CIRCUMSTANCES THAT WOULD ENTITLE THEM TO FEDERAL INJUNCTIVE AND DECLARATORY RELIEF.

Petitioners each have been once arrested and once convicted for having violated the City of Dallas loitering ordinance.

Petitioners brought this suit seeking both declaratory and injunctive relief from possible future criminal prosecution under this ordinance. The trial court dismissed the Petitioners' Complaint in that it found that the Plaintiffs-Petitioners had made no allegations of bad faith prosecution, harassment, or shown other unusual circumstances which would cause the Petitioners to suffer irreparable injury and harm from the continued enforcement of Section 31-60 of the Dallas City Code.

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed. 2d 669 (1971), and its companion case, *Samuels v. Mackell,* 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed. 2d 688 (1971), established that federal intervention * * * by way of injunctive or declaratory relief, cannot be granted except under extraordinary circumstances where the danger of irreparable injury is great and immediate. 27 L.Ed. 2d at 676. The Supreme Court in *Younger* held that the existence of a "chilling effect" on First Amendment Rights would not by itself justify federal intervention. 27 L.Ed. 2d at 679.

In the absence of showing that an "irreparable injury" will be suffered, it is improper for a federal district court to grant declaratory relief from future prosecution under state statute or city ordinance on federal constitutional grounds. *Samuels v. Mackell,* supra, *Younger v. Harris,* supra.

Even irreparable injury from future prosecution is insufficient unless "both great and immediate," 27 L.Ed. 2d at 676. The Petitioners have failed to show by their pleadings, argument, or allegations any immediate irreparable injury or harm. The Supreme Court stated that "only in cases of proven harass-

ment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in cases * * * where irreparable injury can be shown is federal injunctive relief in state prosecutions appropriate," *Perez v. Ledesma,* 401 U.S. 87, 27 L.Ed. 2d 701, 91 S. Ct. 674 (1971); *Younger v. Harris,* supra; *Ex Parte Young,* 209 U.S. 123, 52 L.Ed. 714, 28 S. Ct. 441 (1907).

There is nothing in the record before this Court to suggest that any of the City officials who are Respondents herein undertook the complained of prosecutions other than in a good faith attempt to enforce the state's criminal laws. Nothing in the record asserts or shows that any of the named City of Dallas officials selectively chose to enforce its loitering ordinance against only "long-haired highway travelers," as indicated in *Lewis v. Kugler,* 446 F. 2d 1343, 1345 (3 Cir., 1973), or against any other specific racial, social, or ethnic group or class of persons.

The Petitioners contend that the trial court should not have invoked the *Younger* doctrine because they assert that they challenge the City of Dallas' ordinance as being unconstitutional on its face. Contrary to what is asserted by the Petitioners, *Younger* does address itself to the situation wherein a state statute is attacked as being facially unconstitutional. The Supreme Court stated with respect to such an attack, "the possible unconstitutionality of a statute (on its face) does not in itself justify an injunction against good-faith attempts to enforce it, and * * * Harris has failed to make any showing of bad faith, harassment, or any other unusual circum-

stances that would call for equitable relief." 27 L. Ed. 2d at 681.

The Supreme Court in its recent decision, *Jane Roe, et al. v. Henry Wade,* 410 U.S. 113 (1973), again stated what is required of a plaintiff before he can bring an action to declare an ordinance or state statute unconstitutional. The same principles articulated in *Younger,* and its companion cases were respected when Dr. Hallford's complaint was dismissed. Although a plaintiff alleged that the Texas abortion statutes were facially unconstitutional, the court found that Dr. Hallford's status as a "potential future defendant," was indisinguishable from the situation that had been previously considered in *Samuels v. Mackell,* supra.

The Fifth Circuit has had on recent occasions several opportunities to determine the very issue brought on this appeal. In *Becker v. Thompson,* 459 F 2d 919 (5 Cir. 1972), the Court held the *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened criminal prosecution. Later decisions of the Fifth Circuit have followed this holding: *Reed v. Giarusso,* 462 F. 2d 706 (5 Cir. 1972), *Hunt v. Rodriguez,* 462 F. 2d 659 (5 Cir. 1972); *Milner v. Burson,* 470 F. 2d 870 (5 Cir. 1972); *Community Action Group v. City of Columbus,* 473 F. 2d 966 (5 Cir. 1973). The Fifth Circuit has just determined that it would have an en banc hearing of *Jones v. Wade,* Civil Action No. 72-1481 (5 Cir., May 30, 1973), a case relied upon by the Petitioners in their Brief.

Before federal declaratory or injunctive relief is available

in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

II.

PETITIONERS DID NOT USE DILIGENCE IN PRESENTING THEIR CONSTITUTIONAL ARGUMENTS TO THE STATE COURTS WHEN THEY VOLUNTARILY WAIVED THEIR RIGHT TO A TRIAL DE NOVO, AND MADE NO EFFORT TO APPEAL THEIR PLEA OF NOLO CONTENDERE IN THE CITY OF DALLAS' MUNICIPAL COURT.

Contrary to what has been asserted by the Petitioners, they did not use diligence in their challenge of the City of Dallas' Loitering Ordinance in the state courts. The Petitioners assert in pages 11 and 12 of their Brief, that their bringing a writ of prohibition before the Court of Criminal Appeals *prior* to their trial in municipal courts shows reasonable exhausiton.

In *Bergeron v. Travis County Court,* 174 S.W. 365 (Tex. Crim. App. 1915), a decision surprisingly relied upon by the Petitioners, the Texas Court of Criminal Appeals gave clear and specific directions as to how to challenge the constitutionality, validity and jurisdiction of corporation court (now referred to as municipal court)*.

The "proper place" to present a plea challenging the jurisdiction of corporation court, the constitutionality and validity

* The name of the "corporation court" was changed to "municipal court" by Acts 1969, 61st Legislature, Page 1689, Ch. 547. See Vernon's Ann. Civ. Stat., Art. 1194A.

of a local ordinance is in the corporation court "when the complaint was filed." *Bergeron v. Travis County Court,* supra, page 367. This decision states that the corporation court (now called municipal court) should have the first opportunity to rule on the constitutionality of an ordinance and entertain such plea that a defendant desires to bring therein, and *after* trial in corporation court, the county court then should be given "an opportunity to rule thereon." *Bergeron v. Travis County Court, supra,* held that a plea is "prematurely brought" if it is brought to the Texas Court of Criminal Appeals *before* it has been first considered by the county court. From a close reading of this decision, it appears that the Petitioners did not follow the only case they cited for the proposition contained in their brief that "reasonable exhaustion is satisfied by writ of prohibition." (See page 11-12, Petitioners' Brief)

It is only in cases in which a court has no jurisdiction, or in which it is exceeding its jurisdiction, that a writ of prohibition will lie; and a party petitioning for a prohibition in Texas must have objected to jurisdiction of court at the outset, and he must have no other legal remedy, or else it is not obligatory on the Texas Court of Criminal Appeals to grant a writ of prohibition. *Burks v. Stovall,* 324 S.W. 2d 874, 168 Tex. Cr. R. 207, (Ct. of Crim. App., 1959).

The Municipal Court of Dallas was within its jurisdiction to hear the cases of Tom E. Ellis and Robert D. Love. The $10.00 "nolo contendere" fines paid by the Petitioner, was cleraly within the limits of Municipal Court jurisdiction. Article 4.14, Texas Code of Criminal Procedure Annotated (1965). An appeal and a trial de novo, to the County Court was further undeniably available to Petitioners. Article 44.17, Texas Code of Criminal Procedure Annotated (1965). The Petitioners' writ of prohibition cannot be used as a substitute for an appeal. *Hebert v. Probate Court No. 1 of Harris County,* 466 S.W. 2d 849 (Ct. Civ. App. Houston 1971);*Miller v. Ben C. Connally,* 354 F. 2d 206 (5 Cir. 1965).

The Petitioners by foresaking their rights to a trial de novo under Article 44.17, Texas Rules of Criminal Procedure, cannot now, in this Court, set up and rely upon their alleged defenses in the state courts. The Petitioners unlike the Plaintiff in *Jones v. Wade,* supra, had a right of appeal, a right to have their case heard in the Texas criminal courts. Having failed to assert their remedies in the county court, it is now the Petitioners' burden to show that "this cause of action would not have afforded adequate protection." See *Younger v. Harris,* 27 L.Ed. 2d at 676; *Fenner v. Boykin,* 271 U.S. 240, 70 L.Ed. 927 (1926). The case for non-intervention in this suit has been made stronger because the Petitioners did not press their constitutional arguments at every step of the state procedings. *Palaio v. McAulifle,* 466 F. 2d 1230, 1233 (5 Cir. 1972).

III.

PETITIONERS' COMPLAINT DID NOT PRESENT A SUBSTANTIAL CONTROVERSY BETWEEN PARTIES HAVING ADVERSE LEGAL INTEREST OF SUFFICIENT IMMEDIACY AND REALITY TO WARRANT THE ISSUANCE OF A DECLARATORY JUDGMENT.

The Petitioners herein seek declaratory relief from possible future prosecution under the City of Dallas' Loitering Ordinance. The Supreme Court has repeatedly stated that the basic

question in seeking a declaratory judgment respecting the constitutionality of a statute is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Golden v. Zwickler,* 394 U.S. 103, 22 L.Ed. 113, 118, 89 S. Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273, 85 L.Ed. 826, 828, 61 S. Ct. 510 (1941). (emphasis added)

When it is wholly conjectural that a person seeking declaratory relief will be again prosecuted under a statute, such a person should not be granted declaratory relief. *Golden v. Zwickler,* supra. Unless the Petitioners can show that they face a genuine and immediate threat of future prosecution under Ordinance 31-60, their case has lost its character as a present live controversy of the kind that must exist if the Supreme Court is to avoid rendering advisory opinions on abstract propositions. *Hall v. Beals,* 396 U.S. 45, 24 L.Ed. 2d 214, 218, 90 S. Ct. 200 (1969); *Golden v. Zwickler,* supra; *Baker v. Carr,* 369 U.S. 186, 204, 7 L.Ed. 2d 663, 667, 82 S. Ct. 691 (1962).

The "normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle v. Landry,* 401 U.S. 77, 27 L.Ed. 2d 696, 700, 91 S. Ct. 758 (1971). The Third Circuit found a "very real threat of enforcement" before it affirmed the Three-Judge District Declaratory Judgment in *Thoms v. Heffernan,* 473 F. 2d 478, 485 (2 Cir. 1973). A trial court's Ruling to Dismiss

was upheld largely based on its finding of "No present threat of any further injury," *Alga, Inc. v. Crossland,* 327 F.S. 1264, 1266, affd, 459 F. 2d 1038 (5 Cir. 1972), cert den., 41 L.W. 329.

Even if the Petitioners' Complaint had asserted the inadequacy of relief in the Dallas County Criminal Court of Appeals, this would be an argument that Tom E. Ellis and Robert D. Love should not be able to advance. The Petitioners never did make an attempt to obtain a trial de novo. These litigants can only assert their own constitutional rights, and cannot sue for the deprivation of someone else's civil rights. *U. S. v. Raines,* 362 U.S. 17, 80 S. Ct. 519, 4 L.Ed. 2d 524 (1960); *O'Malley v. Brierley,* 477 F. 2d 785 (3 Cir. 1973). Before one can assert that the Dallas County Criminal Court of Appeals offers them inadequate relief, one should at least show that he had sought an appeal or a hearing from that court. The Petitioners, having failed to avail themselves of a trial de novo in the County Court, are not proper persons to advance any further the constitutional challenge of Ordinance 31-60.

CONCLUSION

Respondents respectfully submit that the Petitioners have not shown by their Complaint that they are entitled to federal equitable relief for the following reasons:

(1) They have failed to assert any allegations of threatened bad faith prosecution, harassment or any unusual circumstance justifying federal declaratory or injunctive relief;

(2) They have failed to show that they used diligence in

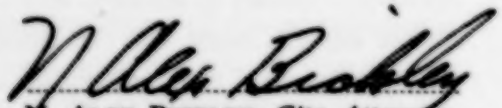
presenting their constitutional arguments in the State Courts;

(3) The Petitioners' Complaint does not present a controversy of sufficient immediacy and reality to warrant federal intervention.

The Respondents assert that based on the foregoing and those reasons more explicitly set out in his Judgment, the trial court did not abuse his discretion in dismissing the Petitioners' Complaint.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Court deny Petitioners' Writ of Certiorari.

Respectfully submitted,



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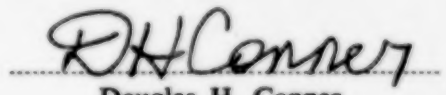
CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Brief has been served upon Mr. Walter W. Steele, Jr., 3315 Daniels, Dallas, Texas 75205, Attorney for Petitioners, by depositing the same in the United States Certified Mail, Return Receipt Requested, on this the 13th day of August, 1973.



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